United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7245

United States Court of Appeals

For the Second Circuit

B

P/S

J. P. FOLEY & CO., INC., JOHN P. FOLEY, ANNE A. FOLEY and ANITA SALISBURY,
Plaintiffs-Appellees,

against

OLIVER D. VANDERBILT, JAMES B. RAMSEY, JR., THOMAS MCNELL, BRUCE RAYMOND, RICHARD MCDERMOTT, WILLIAM GROSSCRUGER, FRANK LYNCH, GEORGE MORPURGO, MELVILLE H. IRELAND, JAMES J. RUSH and BLAIR & CO., INC.,
Defendants,

ARTHUR YOUNG & COMPANY,
Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of New York

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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J. P. Foley & Co., Inc., John P. Foley, Anne A. Foley and Anita Salisbury,
Plaintiffs-Appellees,

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Preliminary Statement

This is an appeal from an order of the Honorable Charles H. Tenney, entered April 16, 1975, denying defendant-appellant Arthur Young & Company's ("Arthur Young's") motion to disqualify counsel for plaintiffs. Judge Tenney's opinion is unreported.

Issues Presented

I. Did the district court err in declining to disqualify plaintiffs' attorneys when a lawyer who is "of counsel" to that firm will or ought to be a witness for plaintiffs at the trial?

A. Is there a "slight possibility" of a lawyer being called as a witness in this Rule 10b-5 case when the lawyer denies having received material information during the negotiations he conducted for plaintiffs, plaintiffs assert that such material information was never disclosed to them, and the lawyer's testimony is contradicted by another witness?

B. Is plaintiffs' averment that they will reserve use of the lawyer-witness to rebuttal sufficient to create an exception to the Code of Professional Responsibility?

C. Is a lawyer who is "of counsel" to plaintiffs' attorneys a lawyer "in the firm" for purposes of the Code of Professional Responsibility and is the lawyer any less "in the firm" because he has his own contingent fee arrangement with plaintiffs?

D. Is there sufficient "undue hardship" to except this case from the mandate of the Code?

Statement of the Case

This action stems from an investment by plaintiffs in Blair & Co., Inc. ("Blair"), a brokerage firm now in liquidation. Plaintiffs allege fraud under the federal securities laws and at common law. Plaintiffs have demanded

trial by jury. (Complaint, Record No. 126) While substantial pre-trial proceedings have been completed, Note of Issue has not been filed and no date for trial has been set.

Arthur Young was Blair's independent auditor, did not participate in any of the negotiations between plaintiffs and Blair (JA 18)* and the facts as to plaintiffs' transaction with Blair became known to Arthur Young and its counsel only through discovery conducted in this litigation. Depositions established that plaintiffs were represented in their extensive negotiations with Blair, which commenced in early February 1970 and continued until agreements were signed in April 1970, by plaintiff John P. Foley and plaintiffs' attorney, Leonard Feldman, Esq. (JA 6; JA 28-9) Feldman was then, as he is now, "of counsel" to Milberg & Weiss,** plaintiffs' attorneys in this action. (JA 6; JA 13; JA 44-5) Following the completion of the deposition of Foley and Feldman (a completion delayed by plaintiffs' unwarranted assertion of attorney-client privilege as to the Feldman role in the negotiations) (JA 6; JA 8-9), it became obvious to White & Case, counsel for Arthur Young, that Feldman's testimony was essential to plaintiffs' case. This was confirmed when Milberg & Weiss advised counsel that they intended to call Feldman as a witness on plaintiffs' behalf. (JA 6)

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* References in the form "JA " are to the indicated page in the Joint Appendix.

Judge Tenney's prior decision on Arthur Young's motion to compel disclosure of the role played by Leonard Feldman in the negotiation of the transactions sets forth certain of the facts herein and is reported at 65 F.R.D. 523 (S.D.N.Y. 1974) and reproduced at JA 17.

** The name of the firm in 1970 was Leibowitt, Milberg, Weiss & Fox (JA 45).

Immediately thereafter, White & Case advised Milberg & Weiss, by letter dated May 20, 1974, that in the opinion of White & Case, the Code of Professional Responsibility precluded Milberg & Weiss from acting as trial counsel. (JA 16) Milberg & Weiss made no substantive answer to the letter of May 20, 1974 for some eight months after the matter had been brought to their attention. After Milberg & Weiss made clear their intention of remaining in this case, White & Case was compelled to move for disqualification in order to protect their client.

Milberg & Weiss opposed disqualification on three grounds: (1) plaintiffs are not now planning to call Feldman as a witness in their case-in-chief, although "Mr. Feldman's testimony might be necessary in rebuttal. * * *" (JA 85, ¶6) (2) Feldman is not "in the firm" of Milberg & Weiss because he is only "of counsel." (JA 84, ¶3; JA 85, ¶4) (3) Milberg & Weiss has spent a substantial amount of time in pre-trial preparation and they "are perhaps uniquely qualified to try this lawsuit." (JA 88, ¶5; JA 89, ¶6) The district court held it need not reach questions (2) and (3) and denied the motion on the grounds that in light of plaintiffs' averments as to their trial strategy "it appears that the possibility of [Mr. Feldman's] being called as a witness is slight." (JA 139)

This Court has jurisdiction of this appeal. *Ceramco, Inc.* v. *Lee Pharmaceuticals*, 510 F.2d 268 (2d Cir. 1975); *Silver Chrysler Plymouth, Inc.* v. *Chrysler Motors Corp.*, 496 F.2d 800 (2d Cir. 1974).

ARGUMENT

The Code of Professional Responsibility requires disqualification of the firm of Milberg & Weiss, whose counsel, Leonard Feldman, either will or ought to be a principal witness on behalf of the plaintiffs in the trial of this action.

A. The Requirements of the Code of Professional Responsibility Mandate Disqualification.

The ancient principle of legal ethics, that a lawyer and his firm should leave the conduct of a trial to other counsel if a lawyer in the firm is or ought to be a witness at the trial, is restated in the ABA Code of Professional Responsibility in mandatory terms:

> "A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness, except that he may undertake the employment and he or a lawyer in his firm may testify:
>
> "1. If the testimony will relate solely to an uncontested matter.
>
> "2. If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.
>
> "3. If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client.
>
> "4. As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case."

DR 5-101(B).* See also ABA Canons of Professional Ethics No. 19 (superseded by the Code of Professional Responsibility).

If a firm should undertake to represent a litigant and in the course of pre-trial proceedings learn that a lawyer in the firm is to be called as a witness on behalf of its client, the firm's withdrawal as trial counsel is mandatory. DR 5-102(A) provides:

> "If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101(B)(1) through (4)."

Where, as here, pre-trial proceedings establish the necessity of the lawyer's testimony, disqualification of the firm from further proceedings as counsel is required. *Draganescu* v. *First National Bank of Hollywood*, 502 F.2d 550 (5th Cir. 1974), *cert. denied*, 43 U.S.L.W. 3571 (April 21, 1975); *Molded Plastic Box Company, Inc.* v. *Precision Polymers, Inc.*, 73 Civ. 3939 (S.D.N.Y. Dec. 3, 1974) (Knapp, J.).

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* The Disciplinary Rules of the Code are cited "DR ." and the accompanying Ethical Considerations are cited "EC ."

B. The Facts Establish that Feldman Either Will Be a Witness or Ought to Be a Witness on Behalf of Plaintiffs.

Milberg & Weiss, in response to a direct question from White & Case, informed White & Case that plaintiffs intended to call Feldman as their witness.* (JA 6) After the motion to disqualify was made, Milberg & Weiss retreated to the assertion that their present trial strategy calls for holding Feldman as a "rebuttal" witness. Stating that they have no present intention of using Feldman on their case-in-chief, plaintiffs carved out the right to use Feldman at trial, asserting:

> "* * * Mr. Feldman's testimony might be necessary in rebuttal if the defendants force it by attributing statements or knowledge to him during their case." (JA 85, ¶6)

The district court accepted these averments, holding:

> "* * * it appears that the possibility of his being called as a witness is slight. Plaintiffs have stated to the Court in their papers that they do not intend to call him during their case-in-chief. The only possible need which can be foreseen at this time is the use of his testimony in rebuttal." (JA 139)

DR 5-101(B) and 5-102(A) do not, however, allow attorneys to avoid the Rules either by not offering a lawyer-

* Mr. Milberg denied making this statement and averred that in May 1974 he stated only that Feldman's testimony might be needed in "rebuttal." (JA 85, ¶6) The White & Case letter of May 20, 1974 to Mr. Milberg recites "You advised me that plaintiffs in this matter expect to call as a witness on their behalf Leonard Feldman." (JA 16) There was no mention of the word "rebuttal" until its appearance in Mr. Milberg's affidavit in opposition to the motion to disqualify some ten months after the May 1974 letter.

witness or by saving him for rebuttal. The Rules are not confined to a lawyer who *will be* a witness. Nor are the Rules concerned with when in the trial the lawyer will be a witness. The Rules, DR 5-101(B) and 5-102(A), prohibit representation where it is "obvious" that the lawyer "*ought* to be called as a witness * * *" (emphasis added). Thus the question is not whether a lawyer is competent to testify at trial, and accordingly *City Bank of Honolulu* v. *Rivera Davila,* 438 F.2d 1367 (1st Cir. 1971), *Bank of America* v. *Saville,* 416 F.2d 265 (7th Cir. 1969), *cert. denied,* 396 U.S. 1038 (1970) and *United States* v. *Fiorillo,* 376 F.2d 180 (2d Cir. 1967), relied upon by the district court (JA 138), are inapposite. Indeed, in *Bank of America* v. *Saville, supra,* the court, while declining to find the attorney's testimony incompetent or reason for reversal of the judgment below, still admonished:

> "Under the circumstances it may have been foreseeable that he would be called to testify. If so he should have avoided participation as attorney even in the pre-trial stages." (416 F.2d at 272)

The inquiry here, then, is not whether Milberg & Weiss can arrange their trial strategy to avoid calling Feldman, but whether the inherent facts make it "obvious" that Feldman is a witness who "ought to be" called.

Plaintiffs' counsel here apparently proposes to prove a non-disclosure case without offering the testimony of one of the two persons who participated in the negotiations on behalf of the plaintiffs. It is undisputed that negotiation of the transaction on behalf of plaintiffs was conducted by plaintiff John P. Foley and Feldman. It is further undisputed that Foley authorized Feldman to attend meetings which Foley did not attend and that Feldman did attend

such meetings without Foley. (JA 7; JA 38-41) Feldman had communications, either by telephone or through meetings with representatives of Blair, on at least nineteen separate occasions at which Foley was not present, and as to which only Feldman can testify on behalf of plaintiffs. (JA 7) The deposition testimony establishes that Feldman's testimony cannot be either "cumulative" or "unnecessary," as the district court thought possible. (JA 139-40) Rather, Feldman's testimony goes directly to the heart of any non-disclosure case: what the plaintiffs knew and what defendants allegedly failed to disclose.

Certainly the parties in their conduct of pre-trial proceedings have recognized the importance of Feldman as a fact witness. Plaintiffs originally attempted to shield the Feldman role, asserting that he was a scrivener and asserting privilege as to what Feldman knew. After the district court directed that further discovery was to be taken (in which plaintiffs were not to cut off, as they previously had, questioning as to the nature of Feldman's services), plaintiffs withdrew the claim of attorney-client privilege. (JA 26)

The pivotal nature of Feldman's testimony to plaintiffs is illustrated by the importance plaintiffs put on an alleged colloquy between Feldman and John Richardson, in-house counsel for Blair during the negotiation of the transaction, and a non-party witness herein. According to Feldman's testimony at deposition, Feldman, at a meeting where only Feldman was present for the plaintiffs, asked Richardson whether there were "any other documents that he thought I should see" before the plaintiffs entered into the trans-

action. (JA 47-51; JA 54; JA 59-61) Feldman testified that he felt that he had no ability to specify what documents to ask for, and he testified that "I had to rely on Mr. Richardson to supply me with whatever he thought I required in order to do the work that I was called on to do." (JA 60) On plaintiffs' theory of the case, Feldman's blanket request on behalf of plaintiffs for "all documents" created some obligation which defendants failed to meet.

Basic to plaintiffs' case is the claim that they did not know information set forth in a document entitled Answers to Financial Questionnaire, that they never saw this document before they entered into the complained of transaction, and that it should have been produced to them pursuant to Feldman's request to Richardson to produce all relevant documents. (JA 30-37; JA 49, 52-3; JA 60, 63-4) This claim raises fundamental questions as to Feldman's credibility. The Questionnaire was a document required under Securities and Exchange Commission Rule 17a-5, 17 C.F.R. §240.17a-5, to be filed for every brokerage house. It was referred to in the footnotes to the balance sheet upon which plaintiffs do assert reliance. (Complaint, ¶¶17-21) Feldman, an experienced attorney, should certainly be expected to be aware of documents whose filing is a matter of public record and which are specifically referred to in the very document which is asserted to be the ground for Arthur Young's liability.

Feldman's testimony as to what he, as the representative of plaintiffs, was told, is contradictory to other testimony. Richardson testified that he specifically informed Feldman, at a meeting where only Feldman was present for plaintiffs, that Blair had lost an estimated $1,500,000 be-

tween September 26 and December 31, 1969; that Blair's book value as of December 31, 1969 was zero; and that losses in January and February 1970 were estimated at approximately $2,000,000. (JA 71-75) Richardson's testimony, if accepted by the jury, would eliminate plaintiffs' claim that they did not know Blair had incurred operating losses between October 1969 and February 1970 and that Blair's stockholder equity had been wiped out. Feldman on deposition denied that Richardson ever told him this information. (JA 65-67)

Feldman's testimony further conflicts with Richardson's in regard to whether or not plaintiffs were told of a planned withdrawal of securities by Melville Ireland, a director of Blair and a defendant herein. Plaintiffs assert (Complaint, ¶8(e)) that they were not informed of this planned withdrawal. Richardson on deposition testified that the planned Ireland withdrawal was disclosed to Feldman. (JA 76) Feldman, however, testified that Richardson "made up the story." (JA 65)

By reserving the right to use Feldman "in rebuttal," plaintiffs, aware of what the deposition testimony has adduced, virtually concede that, sooner or later, plaintiffs are going to offer Feldman as a witness. The distinction plaintiffs attempt to create between case-in-chief and rebuttal testimony is meaningless. Trial lawyers are well aware that the rules governing the order of proof are inherently discretionary and that there is often a tenuous distinction between "case-in-chief" and "rebuttal." See generally 6 J. Wigmore, *Evidence* §1873 (3d ed. 1940). Where, as here, the issue is what plaintiffs were or were not told, it is obvious that plaintiffs can use Feldman's testimony as

"rebuttal" despite the fact that under other circumstances they might have wished to have Feldman appear as part of the case-in-chief.

The Code of Professional Responsibility makes no distinction between case-in-chief and rebuttal testimony. The Code unambiguously refers to "a witness" and does not make any distinction as to when in the course of a trial the lawyer-witness "ought to" be called. The reasons for the Code's provision are as compelling when the attorney is called in rebuttal as when he is called on direct. The prejudice to defendants is as serious no matter how plaintiffs intend to structure their case. To allow an exception for a "rebuttal" witness when it is, as here, obvious that the witness will have to be called, is to allow attorneys to structure their case for the purpose of avoiding the strictures of the Code. This would violate one of the purposes of the Code of Professional Responsibility—to remove from litigation strategy any consideration of the desire of counsel to remain in the case.

C. Feldman Is "in the Firm" of Milberg & Weiss.

The district court attempted to distinguish what it recognized as the leading case, *Draganescu* v. *First National Bank of Hollywood, supra,* on the grounds that here Feldman "will take no part in the trial of the case." (JA 139) DR 5-102(A) does not, however, limit the disqualification to the lawyer-witness who personally participates in the trial, but rather extends the disqualification to all lawyers in the firm. DR 5-102(A) mandates that if a lawyer conducting litigation learns that "he *or a lawyer in his firm* ought to be called as a witness on behalf of his client, he

shall withdraw from the conduct of the trial *and his firm*, if any, *shall not continue* representation in the trial. * * *'' (emphasis added) Certainly there is nothing in *Draganescu* which suggests that the court would have reached a different result so as to allow someone in the attorney's firm to conduct the trial while the attorney testified. It has long been the rule that disqualification of one lawyer extends to all others in his firm. See *e.g., Harmar Drive-In Theatre, Inc.* v. *Warner Bros. Pictures, Inc.*, 239 F.2d 555 (2d Cir. 1956), *cert. denied*, 355 U.S. 824 (1957); *Handelman* v. *Weiss*, 368 F. Supp. 258, 265 (S.D.N.Y. 1973); *cf. Christensen* v. *United States*, 90 F.2d 152, 154 (7th Cir. 1937).

This requirement, that disqualification extends not only to the witness himself but also to any lawyer in his firm, is logically mandated by the practicalities of present-day litigation. It is as unseemly and prejudicial for an attorney to argue the credibility of another attorney in his firm as it is for him to argue his own credibility. The jury may allow its conclusions as to the credibility and honesty of an advocate to color its opinion of another attorney from the same firm appearing as a witness. The interest of an attorney in the outcome of litigation obviously extends to all others connected with his firm, and the appearance of impropriety is the same.

That, as is here claimed, the lawyer-witness will not sit at counsel table is irrelevant. There is no means by which Feldman's connection with Milberg & Weiss can be avoided. He appears as either interrogator or counsel to a witness in thousands of pages of depositions, including depositions of parties which may be read at trial as part of plaintiffs' af-

firmative case. Defendants are entitled to bring out that Feldman, at the time when he represented plaintiffs in the negotiation of the transactions, was "of counsel" to and had available for consultation the firm of Milberg & Weiss, described by Foley as having "resident expertise in the accounting field." (JA 89, ¶6) Defendants should be able to show that without running the risk of causing plaintiffs to call their lawyer to swear the case. It is relevant in considering Feldman's claim that he never knew enough to request basic financial data on Blair and did not understand what he saw.

Plaintiffs, however, assert that "being of counsel" is not "in the firm" and appear to urge that averments of the separate economic interests of Feldman and Milberg & Weiss preclude application of the rule. Thus, plaintiffs assert that Milberg & Weiss and Feldman have separate fee arrangements with these plaintiffs. (JA 85, ¶5; JA 91, ¶13; JA 94) Milberg & Weiss aver that they share fees with Feldman "on but a few specific occasions * * *." (JA 85, ¶4) The description of the economic relationship between Feldman and Milberg & Weiss, however, would accurately describe that of many partnerships in the practice of law. With respect to this lawsuit and the preceding transaction it is claimed that Milberg & Weiss and Feldman have separate contingent fee arrangements with plaintiffs. Milberg & Weiss assert that Feldman has "no interest" (JA 85, ¶5) in what Foley now avers is the Milberg & Weiss "contingent fee arrangement." (JA 91, ¶13)* On deposition Foley testified that Feldman had not billed him for services in negotiating

* Compare Foley's testimony on deposition that he had no "understanding" or "discussions" as to whether Feldman's fee was to be included in the Milberg & Weiss bill. (JA 43)

the Blair transaction (JA 42), and Feldman testified that before he could bill Foley the "thing exploded." (JA 70) That Feldman and Milberg & Weiss have split their interests in the outcome of this lawsuit in a manner to suit themselves does not negate the fact that it is one firm, with partners and counsel.

DR 2-102(A)(4) of the Code restricts the use of the "of counsel" designation to an attorney who has a close continuing relationship with the firm. As the ABA Committee on Professional Ethics concluded in *Informal Opinion No.* 678 (1963), a firm cannot designate an attorney as "of counsel" if the attorney works on only one case, and the designation assumes that the counsel will be generally available for consultation in a particular field. Feldman has continually had his office with Milberg & Weiss and was and is designated "of counsel" on the firm's letterhead. (JA 44-5; JA 56; JA 85; JA 91; JA 131) On deposition, Feldman testified that by the words "my office" he meant people associated with Milberg & Weiss. (JA 53) And when Feldman was asked whether he had discussed the Foley transaction with attorneys from Milberg & Weiss prior to its closing on April 3, 1970, Feldman declined to answer on the grounds of attorney-client privilege. (JA 46; JA 55-57) Indeed, the best answer to the present claim that "of counsel" designation does not count comes ultimately from Feldman. In defending his claim that the attorney-client privilege prior to litigation extended to Milberg & Weiss, Feldman testified:

> "Q. For all practical purposes, it is the same law firm? It is simply a different arrangement than that of a partnership, is that correct?
>
> "A. That is correct." (JA 56)

Consistent with his status as "of counsel," Feldman has throughout this litigation taken an active, if not the leading, part in pre-trial proceedings. On behalf of plaintiffs, Feldman has appeared in court, has conducted depositions of defendants, and has acted as counsel for plaintiffs when their depositions have been taken by defendants. Feldman has appeared as counsel for plaintiffs at the deposition of every witness in this case (save one) and has appeared more frequently by far than any other lawyer in the firm of Milberg & Weiss. (JA 14) In short, he has been an active member of plaintiffs' trial team, operating under the aegis of Milberg & Weiss. His identification with Milberg & Weiss is as complete as if he were a partner of the firm, and he is a "lawyer in the firm" within the meaning of the Code.

D. Disqualification of Milberg & Weiss Would Not Work a Substantial Hardship Within the Meaning of the Code of Professional Responsibility.

DR 5-101(B)(4) and DR 5-102(A) provide an exception where withdrawal of counsel "would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case." DR 5-101(B)(4). This last exception to the Code's general principles must be read narrowly lest it swallow up the rule altogether. EC 5-10 states that an attorney may serve as advocate and witness "[i]n the *exceptional situation* where it will be manifestly unfair to the client for the lawyer to refuse employment or to withdraw * * *", and it concludes that "it should be clear that refusal or withdrawal will impose an unreasonable hardship upon the client before the lawyer accepts or continues the employment. Where the question arises, *doubts should be resolved*

in favor of the lawyer testifying and against his becoming or continuing as an advocate." EC 5-10 (emphasis supplied)

In *Draganescu* v. *First National Bank of Hollywood, supra,* the Fifth Circuit affirmed an order directing the withdrawal as trial counsel of an attorney who had represented the plaintiffs during the transaction which gave rise to the lawsuit, and planned to continue as counsel at trial. The court held that withdrawal of the attorney as trial counsel would not be a substantial hardship, within the meaning of DR 5-101(B)(4). It reached this conclusion even though there was (1) a close relationship between counsel and his clients, who were Romanians; (2) counsel spoke Romanian and could translate for his clients; and (3) the clients would apparently have to find other counsel (presumably non-Romanian-speaking) willing to serve on a contingent fee basis. The Fifth Circuit put the burden of showing substantial hardship within the meaning of DR 5-101(B)(4) on the party seeking to have counsel act in the prohibited dual role, and it concluded that the plaintiffs had not demonstrated sufficient hardship to come within the limited exception. 502 F.2d at 553.

Certainly plaintiff Foley's fear that other counsel may not be found to represent him in this securities litigation (JA 88, ¶5) may be dispelled by the availability of the flourishing securities bar in this district. And as to Milberg & Weiss' "unique" expertise (JA 89, ¶6), the answer was given by this Court when it disqualified a prominent patent attorney, holding:

> "[T]he possibility that Patentex [defendant] may benefit from Rabin's [plaintiff's counsel's] disqualification

> cannot alter our conclusion that his continued participation in these proceedings would constitute a serious breach of professional ethics. Furthermore, we are certain that despite his considerable talents, [Rabin] is not the only member of the patent bar qualified to capably represent these plaintiffs." *Emle Industries, Inc.* v. *Patentex, Inc.*, 478 F.2d 562, 574-575 (2d Cir. 1973).

Any delay in trial which may result from disqualification has been caused solely by plaintiffs and their counsel. Plaintiffs and Milberg & Weiss had full knowledge of the facts which require disqualification from the inception of this litigation. By an unwarranted claim of attorney-client privilege (JA 17; JA 26) they attempted to shield the Feldman role from defendants. White & Case decided that it would not be appropriate to suggest their disqualification to Milberg & Weiss until the Foley and Feldman depositions were completed and full facts as to the basis of the disqualification were known. (JA 98) Indeed, Judge Knapp's decision in *Molded Plastic Box Company, Inc.* v. *Precision Polymers, Inc.*, 73 Civ. 3939 (S.D.N.Y. Dec. 3, 1974) (holding a motion to disqualify premature when discovery had not been completed and the role of the lawyer-witness not yet established, and denying the motion with leave to renew after discovery was completed and the case ready for trial) indicates that a motion for disqualification should not be made until a complete factual foundation is established. When the factual basis for the necessity of Feldman's testimony had been established by the completion of the Foley and Feldman depositions and the oral confirmation of Milberg & Weiss, White & Case wrote to Milberg & Weiss over a year ago, on May 20, 1974, so that Milberg & Weiss would have the opportunity to withdraw without the necessity for

a motion seeking disqualification, and in order that plaintiffs would have ample time to obtain new trial counsel. (JA 16)

Indeed there still remains ample time for plaintiffs to secure qualified counsel. No pre-trial order, no less a date for trial, has been entered. And plaintiffs are pursuing discovery long after they had complained that the motion to disqualify was made on the "eve of trial." (Compare JA 86, ¶8 with, *e.g.,* Record Nos. 106, 116.)

E. Substantial Prejudice Will Arise from a Continuation of a Dual Role for Milberg & Weiss.

As stated in the Code of Professional Responsibility, an attorney or firm which insists upon acting in the dual role of advocate and witness prejudices the profession, the client, and the opposing party. Ethical Consideration 5-9 points out that:

> "the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case. An advocate who becomes a witness is in the unseemly and ineffective position of arguing his own credibility. The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively."

As the court further explained in the *Precision Polymers* case, *supra,* "The canons are concerned not only with possible prejudice to the attorney's client, but also to potential prejudice to the attorney's adversary. The latter is placed in the peculiar posture of having to deal with an opponent

who is both an advocate and a material witness. Such situations should be avoided if at all possible." (at p. 5)

The prejudice which would result here is plain. The credibility of Feldman will be directly at stake in the trial of this cause. His testimony is contradicted by another witness, and he has a direct pecuniary stake in the outcome. Indeed, Feldman's "integrity, credibility and professional status [is] intertwined inseparably with the issues of the case upon which the jury [is] obliged to make a finding." *Autowest, Inc.* v. *Peugeot, Inc.*, 434 F.2d 556, 568 (2d Cir. 1970).* If Milberg & Weiss continue as trial counsel, Feldman will not take the stand as a witness, but as one of plaintiffs' lawyers, and his testimony will be clouded by argument already made either by him or by another lawyer in the firm. After Feldman has testified for his clients, the jury will find it difficult to separate his role and the role of his firm as advocate from his role as witness. Inevitably, Milberg & Weiss will be in the position of arguing their own credibility, a practice which has been condemned vigorously by the courts, *e.g.*, *Fortunato* v. *Ford Motor Co.*, 464 F.2d 962, 970 (2d Cir. 1972), *cert. denied*, 409 U.S. 1038 (1972).

Furthermore, the entire legal profession suffers disrepute when an attorney takes the witness stand in behalf of a client whose case he is arguing. As the court stated in *Alexander* v. *Watson*, 128 F.2d 627, 631 (4th Cir. 1942),

> "No amount of sophistry can gloss over the impropriety of an attorney's accepting employment in a

* In *Autowest* this Court declined to reverse a judgment on the grounds that counsel appeared as witness. The import of the opinion leaves no question but that the Court did not approve of the dual role.

> cause in which he knows in advance that he is to testify. * * *"

There the court said that if the attorney had discovered that his testimony was required at trial, it would have been his "duty to withdraw from the professional employment." 128 F.2d at 630.

Conclusion

This Court has in recent decisions established that it will require strict enforcement of the standards which govern the conduct of its attorneys. *General Motors Corp.* v. *City of New York*, 501 F.2d 639, 649 (2d Cir. 1974); *Hull* v. *Celanese Corp.*, —— F.2d —— (2d Cir. 1975). While these decisions admittedly deal with other aspects of the Code of Professional Responsibility, the concern they establish for the proper conduct of litigation is here most applicable. The order of the district court should be reversed with directions that plaintiffs' counsel be disqualified from further proceedings in this action.

Respectfully submitted,

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